SUPREME COURT, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-709

AIR LINE DISPATCHERS' ASSOCIATION, ET AL.
Petitioners,

v.

CIVIL AERONAUTICS BOARD,
Respondent.

and

AMERICAN AIRLINES, INC., ET AL.,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILLIAM G. MAHONEY
1015 18th Street, N.W.
Washington, D. C. 20036
Counsel for Petitioners

December, 1974

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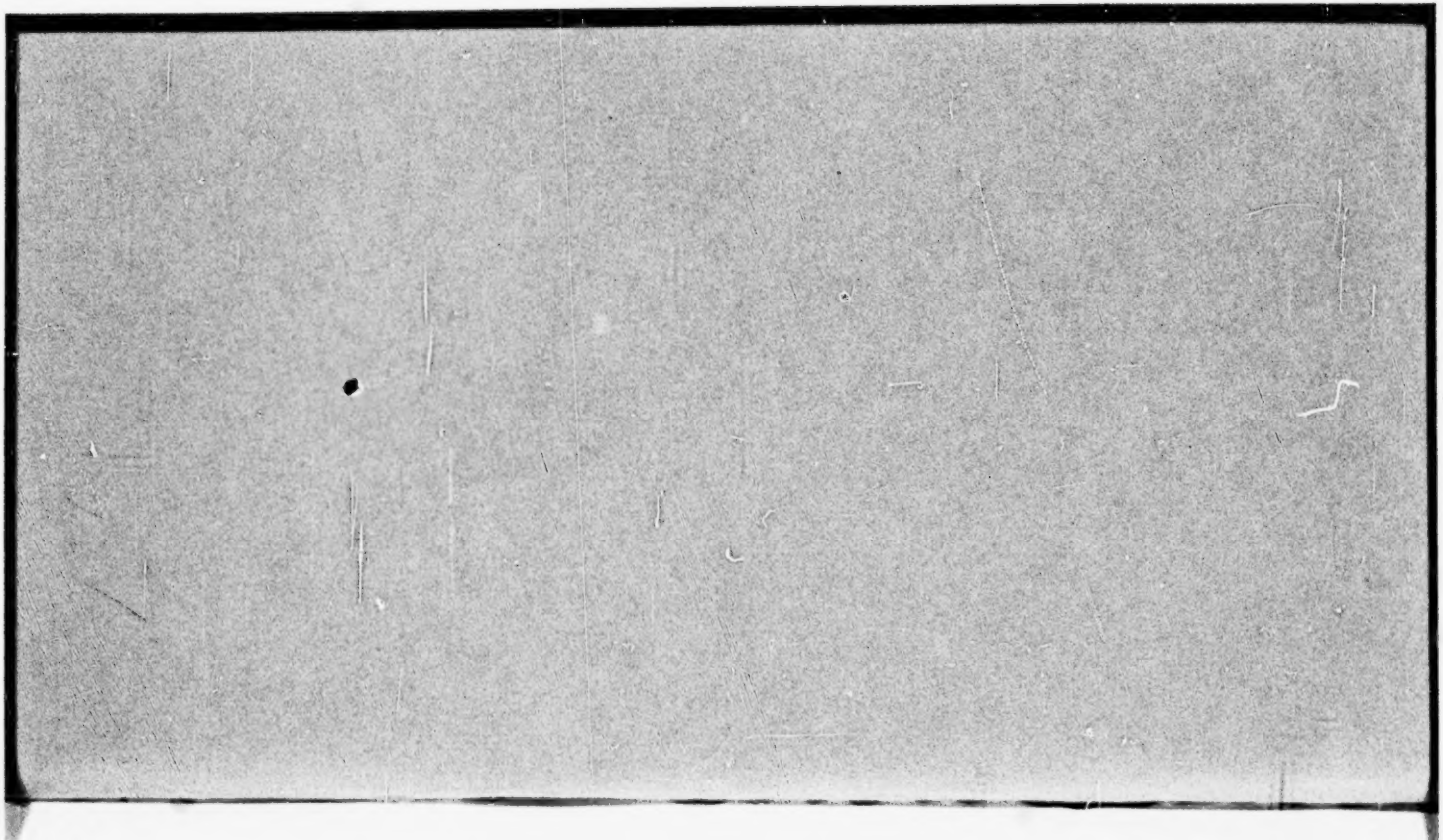

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Petitioners, Air Line Dispatchers' Association, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, Communication Workers of America, Flight Engineers' International Association, International Association of Machinists and Aerospace Workers, and Transport Workers Union of America, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on August 8, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at — U.S. App. D.C. —, 502 F.2d 453 (1974), and appears in the Appendix volume on page iv thereof as Appendix A.[1] Order No. 70-7-114 of the Civil Aeronautics Board, issued July 23, 1970, approving, without an evidentiary hearing, the Mutual Aid Pact is not reported and is reprinted as Appendix I at page 142a of the Appendix volume. Order No. 70-11-110 of the Civil Aeronautics Board, issued November 23, 1970, vacating Order No. 70-7-114 and remanding the proceeding for evidentiary hearing is not reported and is reprinted as Appendix J at page 221a of the Appendix volume. Order No. 73-2-110 of the Civil Aeronautics Board, issued February 27, 1973, approving the Mutual Aid Pact is not reported and is reprinted as Appendix K at page 225a of the Appendix volume.

Also printed in the Appendix volume are the decisions and orders of the Civil Aeronautics Board which preceded the Order from which this appeal is taken and which approved the original Mutual Aid Pact and all but one of the amendments thereto: Order E-13899 is reported at 29 C.A.B. 168 (1959) and is reprinted as Appendix B at page 5a; Order E-14563 is reported at 30 C.A.B. 90 (1959) and is reprinted as Appendix C at page 35a; Order E-15413 is reported at 31 C.A.B. 977 (1960) and is reprinted as Appendix D at page 41a; Order E-21044 is reported at 40 C.A.B. 559 (1964) and is reprinted as Appendix E at page 44a; Order E-24213, disapproving inclusion of local service carriers in the Mutual Aid Pact, is not reported and is reprinted as

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[1] The Appendix, separately printed, will be referred to subsequently in this Petition as "App. p. —".

Appendix F at page 130a; Order E-26000, issued November 17, 1967, is not reported and is reprinted as Appendix G at page 134a; and, Order 70-1-100, issued January 20, 1970, is not reported and is reprinted as Appendix H at page 138a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1974. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board may approve agreements under Section 412(b) of the Federal Aviation Act as not adverse to the public interest because such agreements alter the balance of collective bargaining power in the industry and when it has found that such agreements "may well" tend to prolong interruptions to air commerce?

2. Whether the Civil Aeronautics Board violates its Congressional mandate to foster sound economic conditions in the air transport industry by permitting financially weak carriers to determine for themselves whether to join the Mutual Aid Pact and thereby become subject to the additional financial drains of supporting opposition to strikes on other carriers?

STATUTORY PROVISIONS INVOLVED

Those provisions of the Federal Aviation Act, 49 U.S.C. Secs. 1301 *et seq.*, and the Railway Labor Act, 45 U.S.C. Secs. 151, *et seq.*, which are material to the disposition of this Petition are reprinted as Appendix L beginning at page 331a of the Appendix volume.

STATEMENT OF THE CASE

The original Mutual Aid Pact was executed on October 30, 1958, effective October 20, 1958, between American, Capital, Eastern, Pan American, TWA, and United airlines. The Pact provided mutual assistance in the event that the flight operations of any party thereto was shut down by reason of (1) a strike called to enforce union demands in excess of or opposed to the recommendations of a Presidential Emergency Board appointed under Section 10 of the Railway Labor Act; or (2) a strike called before exhaustion of the procedures of the Railway Labor Act in disputes between carriers and employees; or (3) a strike which is "otherwise unlawful".[2] The assistance provided was in the form of an agreement by the air carriers to pay to the strike-bound carrier the increased revenues of the other carrier parties which were attributable to the strike, less applicable added direct expenses. These were called "windfall payments".

The Pact was amended from time to time over the years until it culminated in its present form which was approved by the Respondent Civil Aeronautics Board decisions now presented to this Court for review.

The history of the Mutual Aid Pact is one of continual extension and expansion from an agreement which was approved by the Respondent Board because it did not hinder achievement of the objectives of Section 102 of the Federal Aviation Act, 49 U.S.C. Sec. 1302, *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168, 173 (1959) (App. p. 10a), *recon. den.* 30 C.A.B. 90 (1959) (App. p. 35a), to an agreement which has been ap-

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[2] The 1960 amendments to the Pact, approved by Respondent in 1964 (App. pp. 44a, *et seq.*), extended payment coverage to all strikes not in contravention of recommendations of a Presidential Emergency Board. (App. p. 45a.)

proved precisely because it alters labor-management collective bargaining balance in favor of management and places additional "restraints [upon employees] consistent with collective bargaining". (Respondent's Majority Opinion, App. pp. 233a-234a, 251a.)

The latest amendments approved by the Respondent did not increase the level of "windfall payments" but provided a maximum level of supplemental payments to a struck carrier of 50% of its normal operating expenses during the first two weeks of a strike, 45% for the third week of the strike, 40% for the fourth week, and 35% for any period thereafter. The amendments also increased the annual maximum liability of any one participating air carrier for supplemental payments by doubling its liability from ½% to 1% of that carrier's air transport gross operating revenues for the carrier's previous calendar year.

The October 1969 amendments to the Mutual Aid Pact also permitted any trunkline carrier to join the Pact by November 15, 1969, without a waiting period or back payment period. In addition, the amendments permitted withdrawal by any carrier party effective at the end of any calendar year beginning December 31, 1972, on one year's notice; and, the Pact was modified to provide that disputes concerning the amount of any payment would be subject to arbitration.

Although the Petitioners opposed approval of the 1969 amendments on the ground that there had been no evidentiary hearing thereon, the Respondent approved the agreement as amended. (App. p. 142a.) The Petitioners filed a timely petition for reconsideration of that order and the Respondent then determined that since the agreement, as amended, had not been subjected to evidentiary hearing, it should be remanded for such hearing. (App. p. 221a.)

Before such a hearing could be undertaken, however, the carriers once again broadened their agreement by amending it to permit local service carrier participation therein. As thus amended, the Mutual Aid Pact was approved by the Respondent on February 27, 1973 (App. p. 125a), following an oral hearing before Administrative Law Judge Arthur S. Present who recommended disapproval of the amendments. (App. p. 271a.)

The Administrative Law Judge held that the increased level of Mutual Aid Pact payments created perils which might undermine the objectives of the Federal Aviation Act. (App. p. 295a.) He also found that carriers could "utilize the higher level of payments" as a consideration in determining the most opportune time to settle a strike (App. p. 296a), citing the record example of TWA which "was financially better off during the two-day strike it incurred in 1970 than if it had fully operated on those days" and Mohawk which had operated at a profit during a strike period with Mutual Aid benefits but which operated at a net loss without a strike even though it had received $592,000 in governmental subsidy payments during the latter period. (App. p. 297a.) The Administrative Law Judge concluded that the "higher level of mutual aid payments may sway a carrier's decision as to when it should settle a strike, to the detriment of the public utilizing air transportation". (App. p. 297a.)

The Administrative Law Judge also disapproved the increase in a carrier member's liability from 1/2% to 1% of its prior year's operating revenue on his conclusion that such an increase could impair the financial condition of certain carriers. (App. p. 299a-300a.)

The Administrative Law Judge cited the reduction of United Air Lines' working capital from an estimated $47,225,000 to $17,520,000 because of its Mutual Aid Pact liability and the payment by Pan American of $9,404,000 in 1970 on the basis of a year in which its rate of return was negative (1969)—70% of those payments being "supplemental" payments. (App. p. 300a.) The Administrative Law Judge found that of the $187,485,000 paid out under Mutual Aid Pact from 1958 through June 1971, 45%, or $84,368,250, was attributable to but four strikes since the inception of the 1969 amendments and that 27% of the total Mutual Aid Pact payments since 1958, or $49,688,000 were reflected in the "supplemental" payments made in connection with four strikes in the 20-month period between October 1969 and June 1971. (App. p. 300a.)

The Administrative Law Judge also concluded that local service carriers should be excluded from the Mutual Aid Pact because their participation would be inconsistent with the public interest and inconsistent with the statutory scheme as reflected in Section 406 of the Federal Aviation Act, 49 U.S.C. 1376. These conclusions were based upon a number of findings. (See, *e.g.*, App. pp. 303a, 304a, 305a, 306a, 307a.)

The Civil Aeronautics Board by a three-to-two vote reversed the Administrative Law Judge and approved the amendments *in toto*. In deciding to approve the Pact, as amended, the Board determined the primary issue to be:

> "Whether the mutual aid payments so shifted the bargaining balance in favor of carriers as to create a serious likelihood that a carrier might resist settlement of a strike on a reasonable basis in

a circumstance where such a settlement was possible." (App. pp. 233a-234a.) [3]

The three-member majority of the Board found that the increased payments provided by the Mutual Aid Pact were for the purpose of increasing a "carrier's willingness or ability to resist union demands which the carrier considers to be unreasonable" (App. p. 235a) but that such purpose was not adverse to the public interest since other economic pressures existed which would prevent the carrier from being "significantly influenced" by reason of mutual aid payments "to resist what it considered to be a reasonable settlement, or to try to force unreasonable concessions on the part of labor." [4] (App. pp. 235a-236a.)

The Majority held that the operating profit received by the members of the Pact during strikes because of augmented mutual aid payments provided by the amendments to the Pact "fall far short of real profits" because of "anticipated profits" which they [the struck carriers] otherwise would have achieved, as well as post-strike losses." (App. pp. 238a-239a.) The Ma-

[3] This issue was specifically rejected by the Board in its original decision as irrelevant in the consideration of the approval of the Mutual Aid Pact. (App. pp. 10a-10b, 14a-14b.)

[4] Regarding these findings of Respondent, Petitioners submit that the dissenting opinion accurately and effectively demonstrates its basic invalidity (App. p. 260a, n. 5):

> According to the majority, it is only 'unreasonable' union demands which will thus be resisted. But one man's unreasonable demand is another's reasonable request; as we have already pointed out, it is both futile and contrary to the Board's proper role as a neutral in labor conflicts to attempt to analyze the effects of the mutual aid amendments in these terms."

jority rejected the conclusion of the Administrative Law Judge that the interim profit payments under the Pact amendments created a dangerous tendency to prolong a strike upon its finding that in the National Airlines strike the carrier had accepted a proffer of arbitration but such proffer had been rejected by the union; the union rejected arbitration in the Northwest strike before the company had indicated whether it was willing to arbitrate; and, in the Mohawk strike the union would not agree to arbitration only on part of the issues as the carrier desired but would only agree to arbitrating on all of the issues in dispute.[5] (App. pp. 239a-240a.) The Majority held that the Pact provided "substantial protection from financially crippling strike losses, at a cost which is reasonable" even though the amended Pact might result in imposing "a certain financial burden on carriers which may be financially weak." (App. pp. 244a-245a.)

The Majority concluded its opinion by expressing the tacit belief that absent the amendments to the Mutual Aid Pact, the employees of carriers could compel their employers to accept all requests made by the employees. (App. p. 250a.)

The dissenting members of the Board at the outset of their opinion found it necessary to comment upon the obviously partisan character of the Majority's opinion. (App. pp. 255a-257a.) The Majority had stated the issue in the case in terms of shifting the bargaining balance in favor of carriers. *See supra*,

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[5] In each of these contrary situations—Labor's refusal to arbitrate all issues in the National Airlines strike and Management's refusal to arbitrate all issues in the Mohawk strike—Respondent places the onus on Labor for prolonging the strike by refusing to arbitrate in the manner desired by Management.

pp. 7-8. The dissenting members strenuously disapproved of the Majority's injection of the Civil Aeronautics Board into the bargaining structure of the industry (App. pp. 255a-257a) and rejected the issue as phrased by the Majority (App. pp. 233a-234a):

> "In our view, the issue is not whether the strengthening of airline management's bargaining position which obviously results from the 1969 mutual aid amendments is a good thing *per se*—a judgment which in our view the Board need not and should not make—nor is it whether airline employees retain effective bargaining power, which they patently do. The issue, rather, is whether under some significant sets of circumstances the 1969 amendments may give carrier management an incentive to act irresponsibly in prolonging a strike."

On March 5, 1973, the Petitioners filed a timely petition for review of the Respondent's decision with the United States Court of Appeals for the District of Columbia Circuit. A decision adverse to Petitioners was rendered by that Court on October 8, 1974, and this Court granted Petitioners an extension until December 6, 1974, in which to file their Petition For a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

The Respondent Has Arrogated to Itself the Authority To Alter Collective Bargaining Relationships in the Air Transport Industry.

Section 412 of the Federal Aviation Act, 49 U.S.C. Sec. 1382, requires the Respondent to disapprove an agreement between air carriers if it is "adverse to the public interest, or in violation of this Act . . . ." Vio-

lations of provisions of the Railway Labor Act are determined to be violations of the Federal Aviation Act, 49 U.S.C. Sec. 1371(k)(4).

In approving the Mutual Aid Pact as amended in its most recent form, the Respondent found the Pact was not adverse to the public interest *because* the Pact strengthened the bargaining power of air carriers and placed additional "restraints [upon employees] consistent with collective bargaining." (App. pp. 233a-234a, 251a.) Section 412(b) does not authorize the Respondent to approve agreements which contravene the design for collective bargaining and labor relations designed for the air transport industry by the Congress in its enactment of the Railway Labor Act. To the contrary, in passing upon agreements submitted to it pursuant to the provisions of Section 412 (b), the Respondent is restricted to interpreting the public interest in terms of elements related to those listed in Section 102 of the Federal Aviation Act, 49 U.S.C. Sec. 1302; and, it seriously encroaches upon the powers conferred by Congress on other governmental agencies under the terms of the Railway Labor Act when it approves an agreement under Section 412 (b) which "may well" tend to prolong interruptions to air commerce. (App. p. 235a.) [6]

The Respondent, or at least a bare majority of its members, may be of the opinion that the Congressional design for collective bargaining has left the air car-

[6] Section 2 of the Railway Labor Act, 45 U.S.C. Sec. 151a, sets forth two of the general purposes of that Act to be: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; * * * (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; . . . ."

riers at the mercy of the unions representing their employees (App. pp. 234a, 250a); however, it is not the prerogative of the Respondent to approve agreements under Section 412(b) of the Federal Aviation Act because they will correct real or imagined imbalances in collective bargaining power. Such actions by Respondent run directly counter to principles enunciated by this Court in *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 490, 497-498 (1960); *see* also, *H. K. Porter Co., Inc.* v. *NLRB*, 397 U.S. 99 (1970). In the *Insurance Agents'* case, this Court held that not even the National Labor Relations Board could base its conclusions upon an attempted equalization of "disparities of bargaining power between employer and union". If such is the case with respect to the agency created by Congress as expert in the field of labor relations, then *a fortiori*, an agency which has no special expertise in that field cannot validly base a decision upon its determination of "whether the mutual aid payments so shift the bargaining balance in favor of carriers as to create a *serious* likelihood that a carrier might resist settlement of a strike on a *reasonable* basis in circumstances where such a settlement was possible." (Emphasis supplied.) (App. pp. 233a-234a.)

In the instant case the Respondent arrogated to itself authority to interpret the public interest under Section 412(b) of the Federal Aviation Act solely in terms of the adjustment of the balance of collective bargaining power in the air transport industry. In doing so, it is respectfully submitted, the Respondent violated principles enunciated by this Court and set a dangerous precedent establishing Respondent's control of and interference in collective bargaining affairs in the air transport industry.

The Court below failed to address itself to this issue, determining instead to view the matter negatively as a refusal by the Respondent to interfere with the parties' choice of economic weapons. (App. pp. viii-x.) Such a view ignores the affirmative holding of Respondent that the Pact was not inconsistent with the public interest for the very reason that it shifted the balance of power in collective bargaining to management.

More significantly, the Court below impliedly endorsed the Respondent's stated concept that an administrative agency, if unsatisfied with the law as written by Congress, can take whatever steps it believes are necessary to change it. At page 25 of its majority opinion (App. p. 250a) the Respondent appeared to acknowledge the exclusive role of Congress in formulating our national policy with regard to work stoppages in the air transport industry, but immediately stated its intent to take such steps as it believes necessary to correct a situation "*whether by law* or undue economic pressure" carriers are compelled "to accept all requests of employees."[7] (Emphasis supplied.)

The Respondent based its decision upon an issue about which it had no expertise—the determination of when a shift in the balance of bargaining power becomes adverse to the public interest. The Respondent's original Mutual Aid Pact decision in 1959 was decided upon the proper issue—whether the Pact hindered the achievement of the objectives of Section 102 of the Federal Aviation Act, 49 U.S.C. 1302. (*Six Carrier Mutual Aid Pact*, 29 C.A.B. 168 at 173 (1959), *recon. den.* 30 C.A.B. 90 (1959); App. pp. 10a,

[7] There is no evidence of record nor was there a claim by air carriers that any carrier was ever compelled to "accept all requests of employees".

35a.) Application of that general issue in terms appropriate to the instant proceeding was phrased properly by the dissenting members of Respondent (App. p. 261a):

> "The issue, rather is whether under some significant sets of circumstances the 1969 amendments may give carrier management an incentive to act irresponsibly in prolonging a strike."[8]

The Respondent did not act within the framework of the limited authority granted it by Congress in the Federal Aviation Act. The Respondent, instead, acted within a framework of its own creation: self-authorized to pass upon intercarrier agreements in terms of their effect upon the balance of collective bargaining power within the air transport industry. In so acting, the Respondent exceeded its authority and the Court below erred in failing to confront and deal with that issue.

II.

The Respondent Erred in Permitting Financially Weak Carriers To Determine Whether To Become Obligated Under the Pact.

Under the Pact as approved by Respondent, a member carrier is liable to a payment of up to 1% of its prior year's air transport operating revenue to support a struck carrier. Both the Administrative Law Judge and the dissenting members of Respondent concluded that the basic defect in the provision was

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[8] Respondent recognized that the Mutual Aid Pact amendments "may well" tend to prolong strikes but only when the unions act "unreasonably". (App. p. 235a; but see footnote 4, *supra*, at page 8.) The Court below upheld the Respondent's decision citing the fact that fewer strikes had occurred since the amendments. The Court, however, did not address itself to the cause of the extended length of those strikes. (App. pp. 11a and 12a.)

that it took "no account of the current financial condition of a paying carrier." (App. p. 264a.) Obviously, such payments could seriously weaken a carrier's ability to serve the public if its current financial condition had deteriorated from its condition during the prior year. The dissenting members of Respondent noted, for example, that while the evidence disclosed that Pan American had paid out over $10 million in mutual aid payments in 18 months, that carrier's financial condition had been considered so precarious by the Respondent that it had recently rejected the acquisition of Caribair Airlines by Eastern Airlines because of a possible diversion of less than $10 million from Pan American if the acquisition took place.[9] (App. p. 265a.) The continuing financial deterioration of Pan American is a matter of public knowledge yet that carrier remains obligated under the Pact.

The Respondent, in considering this aspect of the Pact, permits a carrier to make its own choice as to whether to chance liability for such payments (App. p. 246a) despite its conclusion that "the higher payments" may well "impose a certain financial burden on carriers that may be financially weak". (App. p. 245a.)

The Respondent thus has acted in derogation of the mandate contained in Section 102 of the Federal Aviation Act (49 U.S.C. Sec. 1302) to regulate "air transportation in such manner as to . . . foster sound economic conditions in such transportation . . . ."

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[9] Pan American has paid out at least a net of $21,846,000 under the Pact. (App. p. 300a.)

The Court below simply adopted, without analysis, the findings and conclusions of Respondent, including the Respondent's reference to Pan American's payment of only .48% of its operating revenues for the period of January 1, 1970, to June 30, 1971, as support for those findings and conclusions.[10] (App. pp. xvi-xvii; 243a-244a.)

It is respectfully submitted that so substantial a departure from its responsibilities under the Federal Aviation Act warrants thorough review and reversal by this Court.

III.

The Respondent's Interference in and Disruption of the Scheme of Labor Relations Becomes More Pronounced upon Consideration of Its Decision in the Air Conference Case.

At the time the Respondent approved the amended Mutual Aid Pact, there was pending before it agreements submitted by the Airlines Industrial Relations Conference (AIRCON), an association comprising most of the air carriers in the United States.[11] AIRCON would establish an organization through which its carrier members could take consistent positions in bargaining with each union on each of the carrier members thereby effectively imposing upon unions multi-employer bargaining in violation of the

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[10] As noted, *supra*, at page 15, the .48% of Pan American's operating revenue amounted to over $10 million; an amount the Respondent had previously considered as a threat to the already precarious financial condition of that carrier.

[11] The AIRCON agreements have now been conditionally approved by the Respondent. (Board Order No. 73-6-96 of June 22, 1973.) The Board's order has been appealed to the United States Court of Appeals for the District of Columbia Circuit. That Court has scheduled December 12, 1974, as the date for hearing oral arguments in that case.

provisions of the Railway Labor Act. *Brotherhood of Railroad Trainmen* v. *Atlantic Coast Line Railroad Co.*, 127 U.S. App. D.C. 298, 383 F.2d 225 (1967), *cert. den.* 389 U.S. 1047 (1968).

The result of the combined existence of AIRCON and the Mutual Aid Pact is the confrontation by the employees of the industry with industrywide consistent bargaining positions on the one hand and the carriers' ability to operate at a profit during a strike on the other. (App. pp. 237a, 261a.) The combined operation of these agreements totally reforms labor relations in the air transport industry from those designed by Congress in its enactment of the Railway Labor Act.

The Respondent refused to consider the combined effects of these agreements. That refusal was both arbitrary and capricious and justified the setting aside of its decision. The Court below, however, did not address itself to that issue.

There would seem to be little doubt that the decision of the Court of Appeals in the AIRCON case will be the subject of a petition to this Court for a writ of certiorari. In light of that fact; because of the close relationship of these cases as reformations of labor relations in the air transport industry; and, because their combined effect upon those relations are more pronounced than their individual isolated effect, it is respectfully suggested that this Court may wish to defer action upon this petition until this case and the AIRCON case can be considered together.

CONCLUSION

The Respondent cannot be permitted to base its decisions upon considerations which have been reserved by Congress to other tribunals or, indeed, to itself. The Respondent cannot be permitted to determine in what manner and to what extent the balance of bargaining power in the air transport industry may be shifted. Nor may Respondent be permitted to abdicate its responsibility to the public and to the industry by permitting financially weak carriers to decide for themselves whether they should undertake the burden of financially supporting other carriers during strikes.

The petition for writ of certiorari should be granted or, in the alternative, this Court may wish to defer action thereon pending presentation to it of a petition for such a writ in the AIRCON case.

Respectfully submitted,

WILLIAM G. MAHONEY
1015 18th Street, N.W.
Washington, D. C. 20036
Counsel for Petitioners

Of Counsel:

HIGHSAW & MAHONEY
1015 18th Street, N.W.
Washington, D.C. 20036

December 6, 1974